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**DECISION****THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548**FILE: B-205490****DATE: February 10, 1982****MATTER OF: Safety Net Joint Venture****DIGEST:**

Protest alleging that contracting agency was required by law to set aside procurement for small business concerns is dismissed, since where procurement is not a small purchase or item has not previously been successfully acquired from small business, it is within the contracting agency's discretion to set aside. In addition, protest to GAO was untimely filed.

Safety Net Joint Venture protests the failure of the Naval Supply Center, Norfolk, Virginia to restrict a procurement of safety nets (IFB No. N00189-81-B-0128) to small businesses. For the reasons discussed below, the protest is dismissed.

The protester states and our bid protest records confirm, that this requirement was previously solicited under an invitation for bids which was canceled, after bid opening, because the Navy concluded the solicitation was defective. Safety Net maintains that based upon the response of small business concerns to the prior solicitation, the contracting officer could expect to receive at least two bids from responsible small business concerns at reasonable prices, and that therefore the contracting officer was obligated by law to set aside the present solicitation for small business concerns.

There are only two situations where there is a legal requirement to set aside a specific procurement for small business concerns. One is where a contract "has an anticipated value of less than \$10,000 and

which is subject to small purchase procedures" unless the contracting officer is unable to obtain offers from two or more small businesses that are competitive in terms of price, quality and delivery, 15 U.S.C. § 644(j) (Supp. III 1979). The other is where a product or service has previously "been acquired successfully by a contracting officer on the basis of a small business set-aside," subject, of course, to the expectation that competitive offers at reasonable prices will be obtained. Defense Acquisition Regulation § 1-706.1(f) (as amended by Defense Acquisition Circular No. 76-19, July 27, 1979).

The protester has not alleged that the present procurement is a small purchase or that the items being procured have been acquired successfully under a prior small business set-aside. Therefore, there is no legal requirement that this procurement be set aside for small business concerns. That decision is within the discretion of the contracting agency and is not reviewed by our Office. Instrument Control Service, B-194503, April 30, 1979, 79-1 CPD 299.

We also note that Safety Net's protest to our Office is untimely. Safety Net protested the lack of a set-aside to the Navy prior to bid opening, and the agency acted adversely to Safety Net's interests by proceeding with the opening of bids as scheduled on October 23, 1981 without amending the IFB. Under our Bid Protest Procedures, it was incumbent upon Safety Net to file any subsequent protest with our Office within 10 working days thereafter, or by November 6. 4 C.F.R. § 21.2(a) (1981). Since Safety Net's protest was not filed with our Office until November 13, it is untimely, and would not be considered even if it presented an issue which we would otherwise review.

The protest is dismissed.

*Harry R. Van Cleve*  
Harry R. Van Cleve  
Acting General Counsel